No. 95-1516

Supreme Court, U.S.
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In The
# SUPREME COURT OF THE UNITED STATES
October Term, 1995

FORD MOTOR COMPANY,
*Petitioner*

-v-

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually, as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased
*Respondents*

On Petition For Writ of Certiorari
To The Kentucky Court of Appeals

## REPLY BRIEF FOR THE PETITIONER

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Petitioner Ford Motor Company ("Ford") respectfully submits this reply brief to respond to arguments made by Respondents in their Brief in Opposition ("Opp. Br.").

## I. RESPONDENTS' OPPOSITION DOES NOT REBUT FORD'S SHOWING THAT SUMMARY REVERSAL IS WARRANTED

Respondents never claim that the punitive damage instruction given by the trial court in this case informed the jury of the purposes of punitive damages, gave the jury any guidance as to how the appropriate amount of punitive damages should be determined, or provided any of the safeguards of the instruction approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991)("*Haslip*"). In short, Respondents never claim that the instruction met the requirements of due process.

Like the Kentucky Court of Appeals, Respondents contend that that the trial court's constitutional error in instructing the jury was cured by counsel's closing arguments. (Opp. Br. at 11-12.) Unlike the Kentucky Court of Appeals, however, Respondents at least acknowledge this Court's decisions in *Taylor v. Kentucky*, 436 U.S. 478 (1978)("*Taylor*"), and *Carter v. Kentucky*, 450 U.S. 288 (1981)("*Carter*"). According to Respondents, those cases are distinguishable because in this case Respondents' counsel agreed with Ford's counsel that the purposes of punitive damages were punishment and deterrence. (Opp. Br. at 11-12.)

This argument ignores the difference between binding instructions from the court and non-binding argument of counsel, a fundamental distinction that underlies the holdings in *Taylor* and *Carter*. In both of those cases, this Court held that "arguments of counsel cannot substitute for instructions by the court." *Taylor*, 436 U.S. at 488-89; *Carter*, 450 U.S. at 304. There was no hint that argument by some lawyers could substitute for constitutionally required instructions while argument by other lawyers could not. On the contrary, this Court stated in *Taylor* that "[i]t was the duty of the *court* to safeguard petitioner's rights,

a duty *only it* could have performed reliably." 436 U.S. at 489 (emphasis added). Further,

> arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, [record citation omitted], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

*Boyde v. California*, 494 U.S. 370, 384 (1990)(citing *Carter*). Thus, the jury was just as free to disregard the arguments of Respondents' counsel as it was to disregard Ford's. Not surprisingly, therefore, decisions by federal courts of appeals in civil and criminal cases are directly contrary to Respondents' argument.[1]

Respondents' contention that the closing arguments of the *plaintiffs'* counsel protected the *defendant's* constitutional rights is especially untenable in this case. Nothing said by the trial court or by Respondents' counsel confined the jury's discretion to punishment and deterrence or precluded the jury from awarding punitive damages for other purposes. Unlike the jury instruction approved in *Haslip*, neither the trial court nor Respondents' counsel told the jury that it was not required to award any punitive damages at all; that the purpose of punitive damages was "not to compensate the plaintiff for any injury"; or that the jury should take into consideration "the character and the degree of the wrong as shown by the evidence." *Haslip*, 499 U.S. 6 n.1.

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[1] *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995)("Although the district court allowed *the parties* to argue the issue of expenses, the arguments of counsel cannot substitute for proper instruction on the issue.")(emphasis added); *United States v. Polowichak*, 783 F.2d 410, 417 (4th Cir. 1986)("We recognize, of course, that counsel for *both the defense and the prosecution* in final arguments to the jury directed the jury's attention to [the proper issue]. But the law is clear that the arguments of counsel cannot substitute for instructions by the court.")(emphasis added).

Unlike the jury instruction requested by Ford in this case, neither Respondents' counsel nor the trial court told the jury that punitive damages should not be awarded for any purpose other than punishment and deterrence; that the amount of punitive damages should not exceed the amount necessary to impose appropriate punishment and deterrence; or that the jury's decision should be based on the relevant factors and not on Ford's size or wealth. (Pet. App. 35a-38a.)

On the contrary, Respondents' counsel emphasized that the jury was the "conscience of the community"; that it was responsible for "set[ting] the standards of conduct for ... big companies"; that it should "send a signal" and "make your voices heard by your verdict"; and that whether it awarded $100 or $2,000,000 "doesn't make any difference." (Opp. Br. App. at 12a-13a.) Thus, unlike instructions from the court imposing upon the jury a binding obligation to ensure that any punitive award was no larger than necessary for appropriate punishment and deterrence, Respondents' counsel implicitly but unmistakably urged the jury to ensure that its punitive award was large enough to be heard by a "big compan[y]" to which even $2 million would be insignificant.

In short, the Kentucky Court of Appeals improperly disregarded this Court's controlling decisions in *Haslip*, *Taylor*, and *Carter*, and it did so in the face of closing arguments from Respondents' counsel designed to exacerbate the danger of an arbitrary award by encouraging the jury to "use [its] verdict[] to express [its] biases against big businesses." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 (1994). Accordingly, if this Court concludes that plenary review is not warranted, summary reversal is imperative to avoid the manifest injustice of a $4 million punitive award that punishes Ford for making its product safer *and* a $600,000 fine that punishes Ford for daring to ask the

Kentucky appellate courts to correct a patent violation of its constitutional rights.[2]

## II. RESPONDENTS' OPPOSITION DOES NOT REBUT FORD'S SHOWING THAT PLENARY REVIEW IS WARRANTED

The fundamental issue presented by this case is whether due process allows courts to defer to a jury's assessment of punitive damages, to withhold every item in the "full panoply" of procedural protections endorsed in *Haslip*, and at the same time to permit juries to assess punitive damages based on a mere preponderance of the evidence and guided only by "bare-bones" instructions that in reality provide no guidance at all.[3] Contrary to Respondents' assertion, this issue is not "unique" to Kentucky and will not disappear just because a 1988 Kentucky statute will require more detailed instructions in future Kentucky cases. On the contrary, Ford's petition and the *amicus* brief filed by the Product Liability Advisory Council, Inc. ("PLAC") demonstrate that inadequate jury instructions remain a serious problem in at least half of the states and have created a conflict between the Third and Fourth Circuits.[4] (Pet. at 13-19; PLAC Br. at 4-5.) In

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[2] *See* Ky. Rev. Stat. § 26A.300 (imposing damages of 10% on an unsuccessful appellant in the Kentucky Court of Appeals who unsuccessfully seeks review by the Kentucky Supreme Court).

[3] The only item from Alabama's "full panoply" of procedural protections that was theoretically available in this case was the Kentucky rule that prohibits the jury from considering the defendant's wealth. *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974). As discussed above (p. 3), however, Respondents' closing argument effectively encouraged the jury to consider Ford's size and wealth, and the trial court refused to instruct the jury not to consider Ford's size and wealth. (Pet. App. 36a, 38a.)

[4] In addition, of course, slightly less than half of the states that allow punitive damages require proof by a mere preponderance of the evidence. A ruling on this issue in the context of traditional, deferential judicial review will provide needed guidance on this issue to lower courts in all of these states.

fact, as PLAC observes, at least 15 states, like Kentucky in this case, use instructions that provide less guidance than the instruction approved in *Haslip*.[5]

In fact, one of the Respondents in this very case--Intervening Plaintiff Allstate Insurance Company ("Allstate")--has already taken a position on punitive damages in this Court that is plainly inconsistent with the position taken in the Brief in Opposition.[6] Allstate (joined by two other organizations) filed an *amicus* brief with this Court in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), for the express purpose of "expos[ing] the haphazard and capricious manner in which *Haslip* has been implemented." (Allstate Amicus Br. at 1.) According to Allstate, "the vast majority of courts have largely ignored the due process principles articulated in *Haslip*," and as a result the punitive damage system "remains literally out of control." (*Id.* at 5.) Further, according to Allstate, "courts have upheld [a] staggering collection of punishments in disregard of virtually every precept set forth in *Haslip*" and, in particular, "have interpreted *Haslip* to mean that almost any jury instruction on punitive damages will satisfy due process." (*Id.* at 17.) Finally, according to Allstate, "the message of *Haslip* is being misunderstood, ignored or flouted." (*Id.* at 27.)

Thus, at least one of the Respondents in this very case plainly recognizes that this case is *not* unique.[7] The Kentucky Court

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[5] *See* PLAC Brief at 4-5. Most states, unlike Kentucky in this case, at least inform the jury of the purposes of punitive damages. But many states, like Kentucky in this case, fail to inform the jury that it should consider "the character and degree of the wrong as shown by the evidence," a key portion of the instruction approved in *Haslip*. (PLAC Brief at 4-5.)

[6] Allstate claims to take "no position with respect to punitive damages, having been awarded none." (Opp. Br. at (i).)

[7] In fact, the nationwide significance of the issues presented by this case dwarfs the significance of the issue presented in *Oberg*, which involved a truly "unique" Oregon constitutional provision under which Oregon courts had no power to reduce or set aside excessive punitive awards. 114 S. Ct. at 2338. This Court granted certiorari to review that case even though "[e]very other (continued)

of Appeals is far from the only court that has "ignored or flouted" *Haslip* with respect to adequate jury instructions, the only component of due process that this Court has not addressed since *Haslip* was decided and the defendant's most important safeguard against arbitrary awards in any state where "[t]he sanctity of the jury verdict is at the heart of our judicial system." *Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 311 (Ky. 1993).[8]

## III. RESPONDENTS' MERITLESS CHALLENGE TO FORD'S STATEMENT OF THE FACTS NEITHER EXCUSES THE FLAGRANT ERROR BELOW NOR DIMINISHES THE NATIONAL IMPORTANCE OF THE ISSUES RAISED BY THIS CASE.

Respondents apparently hope to excuse the undeniable constitutional error that occurred below and to minimize the importance of this case by raising meritless challenges to Ford's

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State in the Union affords post-verdict judicial review of the amount of a punitive damages award." *Id.*

[8] Respondents, citing *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974), suggest that Kentucky courts provide a "very detailed post-verdict review" of punitive awards comparable to the Alabama system approved in *Haslip*. (Opp. Br. at 12.) In reality, *Hensley* establishes a very deferential standard of judicial review that is not comparable in any respect to the *quasi de novo* review approved in *Haslip*. Under *Hensley*, (1) "the jury has a wide discretion in awarding punitive damages," (2) "the opinion of a jury has been [properly] regarded as the best means of even a fair approximation" of the amount of punitive damages; (3) "every verdict should be treated prima facie as the result of honest judgment upon [the jury's] part," (4) juries "are the constitutional triers of the facts of a case, and courts should exercise great caution in interfering with their verdicts," and (5) it is the court's duty to reverse a punitive award "where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy, or unreasonable prejudice." *Id.* at 763. Thus, the *Hensley* standard--courts must defer to the jury's award absent improper sympathy or unreasonable prejudice--is similar to the Mississippi and Vermont standards about which this Court expressed concern in *Haslip*. 499 U.S. at 21 n.10. In fact, the Kentucky Supreme Court in *Hensley* suggested that courts should exercise even greater caution in reversing a punitive damage award than in reversing a compensatory award! 508 S.W.2d at 764.

statement of the facts. For example, Respondents assert that Ford's petition "commits the common mistake of reciting the evidence most favorable to its position." (Opp. Br. at 1.) They then recite at length the evidence on which they relied at trial to show that the 1984 Ranger's wheel came off before impact, rather than during impact. (Opp. Br. at 2-4.) But all that Ford's petition said on this point was that "[s]ubstantial physical evidence showed that the wheel had been torn off *during* impact," that the jury at the first trial agreed, but that the result of the second trial was "dramatically different." (Pet. at 2-3.) Ford could have devoted several pages to explaining why Respondents' claim for compensatory damages is contrary to the uncontroverted physical facts.[9] But the conflicting evidence on whether the shrink-fit joint failed before impact is irrelevant to the punitive damage issues presented by the petition. Further, Respondents cannot and do not deny that they presented no evidence that any other shrink-fit joint had ever failed before impact under any circumstances, either before or after the accident in this case.[10]

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[9] For example, Respondents' own metallurgist conceded at the second trial that there were impact "Brinell" marks on the inner race of the Ranger's wheel and that those marks could not have been made had the wheel separated before impact. (TAPE No. 4; 01/08/93; 09:41:45.) Ford's detailed argument for judgment notwithstanding the verdict based on the physical facts is contained in its brief in the Kentucky Court of Appeals and in its memorandum in support of its post-trial motions.

[10] The Kentucky Supreme Court struck Respondents' unsupported assertion that there had been another case in which a Ranger lost its wheel because of a shrink-fit failure. (Pet. App. at 14a.) Apparently to avoid violating this ruling, Respondents assert in the opposition that Ford "knew of other *claims* that the shrink-fit assembly failed." (Opp. Br. at 14 n.14, emphasis added.) But only one other "claim" was even mentioned at trial, *Sherer v. Ford Motor Co.*, and limited deposition testimony from that case was admitted solely for purposes of impeachment and not to prove that the claim was true. (TAPE No. 11; 1/20/93; 14:22:02; TAPE No. 12; 1/21/93; 15:28:30.) Moreover, Respondents themselves recognize that that deposition testimony shows that "the spindle [in *Sherer*] did *not* separate prior to impact." (Opp. Br. at 3 n. 3, emphasis added.) Respondents never even (continued)

Respondents also say that "Ford entirely mischaracterizes the record" by suggesting that their punitive damage claim is based on evidence that Ford made its product safer. (Opp. Br. at 5.) But the principal evidence on which Respondents rely in their brief to show that Ford "knew" of a "risk of wheel separation" are Ford's "product change request forms" and testimony from their expert Bihlmeyer and Ford's expert Varin concerning those forms. (Opp. Br. at 5-6, 13-14.) According to Respondents themselves, the change forms and the related testimony reflect Ford's decision to make the Ranger safer by "redesign[ing] the [Ranger's] wheel assembly to include a secondary retention feature" designed to keep the wheel on even in the event of a shrink fit failure. (Opp. Br. at 6.)

Indeed, at trial, Bihlmeyer made it quite plain that Ford's product change forms were the basis for his testimony that Ford had discovered a safety hazard:

> Q. Okay. And what is the basis for your opinion [that Ford knew that the Ranger was defective]?
>
> A. The basis is many of the documents we've been reviewing, they originally designed it with a [wheel retention feature]. It then was removed, and as an engineer I understand some of the advantages for removing that .... Then there was a discovery that that was a--a safety hazard occurred, then there was a fix process a fix to try to put back in some type of wheel retention ....
>
> Q. Well, none of the documents we've looked at so far says that Ford was trying to fix a--a defect in this stem. How do you come to that conclusion?

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offered any evidence that the accident in *Sherer* was caused by a pre-impact shrink-fit failure.

> A. Well, the PCR's [product change requests] are quite clear that the swage operation was added as a stem retention feature. That was why the change was made.

(TAPE No. 4; 01/08/93; 13:48:56.) Bihlmeyer later repeated his claim that it was the "change documents" that showed Ford's "discovery" of the alleged safety hazard:

> *From reading the change documents*...my opinion is that Ford attempted to save cost and weight [but] discovered that ... the shrink fit is insufficient by itself, there is a safety hazard, and they attempted to carefully and quietly, through their internal documentation, make a fix ... .

(TAPE No. 4; 01/08/93; 13:56:30.)

Given this express testimony from Respondents' own expert, there can be no serious question that Ford is being punished for having made its product safer. Even more importantly, that punishment is being imposed under jury instructions that plainly violate Ford's constitutional right to due process, and it is being imposed by state courts that have inexcusably ignored or flouted this Court's controlling decisions.

## IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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